



**The Comptroller General
of the United States**

Washington, D.C. 20548

Mr. Murphy - PL

Decision

Matter of: Transcontinental Enterprises, Inc.
File: B-225802
Date: July 1, 1987

DIGEST

1. A bid cannot be rejected as nonresponsive on the basis that a surety's affidavit which accompanied the bid bond allegedly contained false information regarding the surety's net worth. Responsiveness is determined from the bidding documents at bid opening, and if the bond as submitted is proper on its face, the bid is responsive. The matter instead is one of responsibility, and the acceptability of the surety may be established any time before award.

2. Where a question arises after bid opening as to the adequacy of a bid bond because a surety's net worth may actually be less than stated, agency may still accept the bid because the surety's submission of cashier's check after bid opening met requirement under Federal Acquisition Regulation, 48 C.F.R. § 28.101-4(b) (1986), that net worth of individual sureties need only be equal to the difference between the bidder's price and the price of the next low acceptable bid.

DECISION

Transcontinental Enterprises, Inc. (TCE), protests the award of a contract to the apparent low bidder, M&M Services, Inc., under invitation for bids (IFB) No. N62477-86-B-3693, issued by the Department of the Navy. The contract is for operation and maintenance services for transportation equipment at the Naval Ordnance Station and Tenant Activities, Indian Head, Maryland.

The IFB required each bidder to submit a bid guarantee in the amount of 20 percent of the total bid price. In accord with the applicable Federal Acquisition Regulation (FAR) provision, 48 C.F.R. § 52.228-1 (1985), the IFB stated that failure to furnish a guarantee in the proper form and amount by bid opening might be cause for rejection of the bid.

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TCE argues that M&M's apparent low bid is nonresponsive, that M&M is a nonresponsible bidder, and that its bid must therefore be rejected. TCE asserts that both the negative net worth of M&M's individual surety as well as M&M's allegedly deliberate submission of an unacceptable surety, render M&M's bid bond defective, and its bid nonresponsive. In addition, TCE also claims that certain defects relating to an individual surety's notarized signature on standard form (SF) 28, the affidavit of individual surety submitted with the bid bond, also rendered the bid nonresponsive.

TCE also asserts that M&M is nonresponsible because it alleges that M&M's individual surety failed to disclose certain outstanding bond obligations in its SF 28, that this nondisclosure formed part of a continuing pattern of nondisclosure by M&M in various other contracts with the Federal Government, that the SF 28 of one of M&M's individual sureties contained numerous misrepresentations of that surety's assets and liabilities, and that this surety's actual net worth was negative.

Finally, TCE contests the Navy's affirmative determination of M&M's responsibility based on its receipt of a cashier's check from one of the individual sureties for \$20,000, after bid opening, as evidence of its ability to honor the bid bond. (This amount was slightly more than the difference between M&M's low bid and TCE's next-low bid.) TCE contends that the negative net worth of this individual surety precluded the Navy contracting officer from using this certified check as evidence of bidder responsibility, and that these actions constituted an impermissible substitution of individual sureties after bid opening.

We dismiss TCE's protest in part, and deny it in part.

FACTS

M&M submitted the low bid of \$3,363,085. TCE's bid of \$3,381,140 was second of the four bids opened on February 23, 1987.

M&M's bid contained a bid bond listing two individual sureties. The penal amount of the bond was \$672,617. The SF 28's completed by the sureties and furnished with the bond indicated net worths of \$6,768,000 for the first surety, Dr. William R. Sorrell, and \$1,881,000 for the second surety, Mr. Guy Moody. (Guy Moody is also the 100 percent owner of M&M.)

TCE submitted a protest to the Navy, alleging defects in the bid bond submitted by M&M. The Navy stayed the award subsequent to receipt of the protest, and commenced an

investigation of the net worth of Guy Moody. Before this investigation was completed, however, Guy Moody delivered to the contracting officer a cashier's check in the amount of \$20,000, further evidencing his ability as surety to honor the bid bond. The Navy determined that the cashier's check submitted by Guy Moody satisfied the bid bond requirements, and recommended that the TCE protest be denied.

RESPONSIVENESS OF M&M's BID

As noted above, TCE argues that the negative net worth of M&M's individual surety, Guy Moody, and M&M's alleged deliberate submission of insufficient guarantees render M&M's bid bond defective and its bid nonresponsive. We reject TCE's assertions that M&M's bid is nonresponsive.

The test applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. 49 Comp. Gen. 553, 556 (1970). A bid guarantee's purpose is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract and to provide payment and performance bonds. The sufficiency of a bid guarantee depends on whether a surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee properly may be regarded as defective, and the bid rejected as nonresponsive. Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 C.P.D. ¶ 34. When a required bid bond under a solicitation is found to be proper on its face, the bid is responsive. Consolidated Services, Inc., B-206413.3, Feb. 28, 1983, 83-1 C.P.D. ¶ 192, citing CWC, Inc., B-209383, Oct. 19, 1982, 82-2 C.P.D. ¶ 347. Such a bid bond is proper "on its face" when it has been duly executed by two individual sureties whose affidavits indicate that they both have net worths at least equal to the penal amount of the bond, and the bid bond contains no obvious facial defects, such as submission of a blank bid bond, or markup or alteration of the bond without evidence of surety approval. Argus Services, Inc., B-226164, Apr. 21, 1987, 87-1 C.P.D. ¶ 429.

The record indicates that the Navy examined M&M's bid bond and found no irregularities on the face of the bond. The Navy concluded that the bid bond requirements were met and that the bid was responsive. TCE's assertion that M&M deliberately provided inaccurate information on its SF 28 and that the surety lacked sufficient net worth does not concern a bidder's responsiveness. As indicated above, responsiveness of a bid is determined from a facial

examination of the bid bond provided by a bidder's individual sureties, and is limited to whether the surety is clearly bound by the terms of that bid bond if the bidder fails to fulfill its obligation to execute a written contract. T&A Painting, Inc., B-224222, Jan. 23, 1987, 66 Comp. Gen. _____, 87-1 C.P.D. ¶ 86; Imperial Maintenance, Inc., B-224257, supra. Here, the bond is responsive since Guy Moody represented that he possessed the required net worth, and that he was willing to be bound by the surety agreement. The accuracy of the SF 28 net worth information is a matter of bidder responsibility. T&A Painting, Inc., B-224222, 66 Comp. Gen. _____, supra.

Finally, TCE asserts that Guy Moody's SF 28 presented several facial defects regarding the notarization of his signature, which rendered the bid nonresponsive. Following a Freedom of Information Act request, TCE received the SF 28 form from the Navy in mid-March, at which time the alleged defects should have been apparent. Nevertheless, TCE failed to raise this issue until April 27, more than 1 month later. Since the issue was not raised within 10 days of when TCE knew or should have known this basis of protest, the allegation is untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986); Radionic Hi-Tech, Inc., B-219116, Aug. 26, 1985, 85-2 C.P.D. ¶ 230.

RESPONSIBILITY OF M&M

TCE also asserts that M&M is nonresponsive, based upon a variety of improprieties related to its individual surety. The question of the financial acceptability of an individual surety is a matter of responsibility which may be established at any time before contract award.^{1/} T&A Painting, Inc., B-224222, 66 Comp. Gen. _____, supra. No purchase or award may be made unless the contracting officer makes an affirmative determination of responsibility. FAR, 48 C.F.R. § 9.103(b) (1986). The contracting officer is vested with a wide degree of discretion and business judgment in making this determination; GAO will defer to this judgment unless the protester, who bears the burden of proving his case, shows that there was bad faith by the procuring agency or

^{1/} The contracting officer's obligation to investigate individual sureties is set out at FAR, 48 C.F.R. § 28.202-2 and requires that the contracting officer "determine the acceptability of individuals proposed as sureties, and also notes that "(T)he information provided (in the SF 28 form) is helpful in determining the net worth of proposed individual sureties." (Emphasis added.) There is nothing to prevent the contracting officer from going beyond the SF 28 information in his determination, however, where necessary.

that a definitive responsibility criteria was not met. 4 C.F.R. § 21.3(f)(5); Swedlow, Inc., B-225534; B-225535, Mar. 30, 1987, 87-1 C.P.D. ¶ 359. The latter exception is not raised here. TCE has not made the necessary showing of bad faith here. In our view, the record reflects a reasonable basis for the determination of responsibility.

TCE's assertions as to M&M's nonresponsibility are based on M&M's alleged nondisclosure of bond obligations, its past pattern of such nondisclosures in other contracts, the "unacceptable" negative net worth of Guy Moody, and the allegedly inaccurate value of the assets and liabilities set forth in Guy Moody's SF 28. The record shows that following submission of TCE's protest, the Navy undertook an investigation of Guy Moody's individual surety acceptability. The Navy examined the SF 28, in which Guy Moody had certified (at Item 10 of the form) that he was not a surety upon any other bonds. The Navy investigation did uncover that the surety had failed to provide information concerning a bond involving a contract with Griffis Air Force Base, to which the assets of the surety were obligated, but determined that this had been inadvertently omitted. The record further shows that as to other assertions by TCE, the investigation appeared to directly contradict or, at least, bring into question, several of TCE's claims. For example, TCE asserted that certain liabilities of Guy Moody were omitted from the SF 28 and would decrease his net worth. Upon investigation, the Navy reports that several of those liabilities were in fact already paid off in full. In addition, although the Navy notes that the issue was never fully resolved (as the investigation was ended when the financial acceptability of the surety was determined from other sources) the Navy brings into question TCE's claim that Guy Moody impermissibly included as assets his shares in M&M, the principal on the bond. M&M denied this, stating that the stocks in question were solely-owned stocks of Guy Moody, and not traded in the public market.

In any event, before the Navy investigation was completed, Guy Moody delivered to the contracting unit a cashier's check for \$20,000, as further evidence of its ability to honor the bid bond. The Navy determined that this check and the preliminary review of Guy Moody's affidavit supported a finding that the bidder was responsible.

Our Office previously has held, in Advance Building Maintenance Co., B-176849, Jan. 2, 1973, that the submission of further evidence of financial worth of a surety, in the form of a cashier's check, when the SF 28 of that surety raised questions as to the surety's outstanding bond obligations, was adequate basis for a finding of surety

financial responsibility. In Advance, the check presented covered the total penal amount of the bond.

The Navy's investigation raised a question regarding the net worth of Guy Moody, which, if not equal to the penal amount of the bond, would put into doubt the adequacy of the bid bond as a guarantee for the bid. Although, unlike Advance, Guy Moody's check only covered the difference between the low and next low bids, in our view, the Navy reasonably found the firm financially responsible. In this connection, FAR, 48 C.F.R. § 28.101-4, provides that,

"Noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the following situations when the noncompliance shall be waived, unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest:

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"(b) The amount of the bid guarantee submitted is less than required but is equal to or greater than the difference between the bid price and the next higher acceptable bid."

Under FAR, 48 C.F.R. § 28.101-4, a bid guarantee covering the difference between the low and next low bid is considered adequate security. See Norse Construction, Inc., B-216978, Feb. 25, 1985, 85-1 C.P.D. ¶ 232. Thus, in our view, the Navy properly could find that Guy Moody was an acceptable surety under these circumstances, because the surety provided a cash amount equal to that required by regulations to be sufficient to secure that bond. Furthermore, the submission of the check after bid opening did not constitute a substitution of individual sureties; Guy Moody was the same individual surety both before and after submission of the cashier's check.

Finally, TCE argues that M&M's allegedly false information, supplied to the Navy in its individual surety's SF 28 form, contravenes 18 U.S.C. § 1001 (1982). We note that the cited

statute imposes criminal penalties for knowingly making false statements to the government and that such matters are outside the scope of our bid protest function and should be referred to the Department of Justice. Id.

The protest is dismissed in part and denied in part.

for *Seymour E. Efron*
Harry R. Van Cleve
General Counsel